

DEC 15 2005

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DAVID DEL CASTILLO,

Defendant - Appellant.

No. 04-30375

D.C. No. CR-04-00051-a-JWS

MEMORANDUM^{*}

Appeal from the United States District Court
for the District of Alaska
John W. Sedwick, District Judge, Presiding

Submitted December 5, 2005 ^{**}

Before: GOODWIN, W. FLETCHER, and FISHER, Circuit Judges.

David Del Castillo appeals the 64-month sentence imposed following his guilty-plea conviction for illegal reentry after deportation in violation of 8 U.S.C. §

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

1326(a), enhanced by § 1326(b)(2). We have jurisdiction pursuant to 28 U.S.C. § 1291.

Appellant argues that the district court committed Sixth Amendment error by considering the fact of a prior conviction which was neither proved to a jury beyond a reasonable doubt nor admitted by him. This contention is foreclosed by *United States v. Moreno-Hernandez*, 419 F.3d 906, 914 n.8 (9th Cir. 2005) (“*Booker* bars the district court from considering only those facts not found by the jury *other than* the fact of prior conviction”) (citing *United States v. Booker*, 125 S. Ct. 738, 756 (2005)).

Because appellant was sentenced under the then-mandatory Sentencing Guidelines, and we cannot reliably determine from the record whether any error in the imposition of the sentence under the then-mandatory Sentencing Guidelines was harmless, we remand to the sentencing court to answer that question, and to proceed pursuant to *United States v. Ameline*, 409 F.3d 1073, 1084 (9th Cir. 2005) (en banc). See *Moreno-Hernandez*, 419 F.3d at 916.

REMANDED.